



## **CUI Notice 2020-05 Using Exigent Circumstances Waivers**

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August 20, 2020

### **Purpose**

1. This Notice clarifies when agencies may grant exigent circumstances waivers and how these waivers apply when sharing CUI.
2. This guidance document is binding on agency actions as authorized under applicable statute, executive order, regulation, or similar authority. This guidance document does not have the force and effect of law on, and is not meant to bind, the public, except as authorized by law or regulation or as incorporated into a contract.

### **Background**

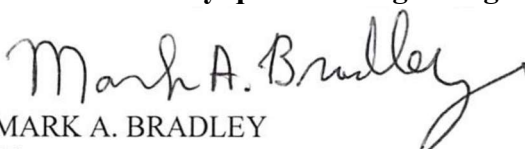
3. The Director of the Information Security Oversight Office (ISOO) exercises Executive Agent (EA) responsibilities for the CUI Program. The CUI regulations at 32 CFR 2002 implement Executive Order (EO) 13556 and establish CUI Program requirements for designating, safeguarding, disseminating, marking, decontrolling, and disposing of CUI.
4. There are currently three types of waivers available under the CUI Program (see 32 CFR 2002.38, Waivers of CUI requirements): 1) limited CUI marking waivers within the agency; 2) limited legacy material marking waivers within the agency; and 3) exigent circumstances waivers. The first two waivers are marking waivers and apply only while the CUI subject to the waiver remains within agency control. Exigent circumstances waivers are not specifically marking waivers and may continue to apply to CUI when an agency shares the information with other agencies or non-Federal entities.

### **Applications of exigent circumstances waivers**

5. The agency's CUI Senior Agency Official (SAO) needs to meet a relatively low threshold for determining that marking or re-marking CUI is excessively burdensome before they may approve limited CUI marking waivers and limited legacy material marking waivers. However, because exigent circumstances waivers differ, as they may continue to apply when the agency shares the CUI outside the agency, the threshold for issuing them is higher (not just when the agency deems it excessively burdensome, but only when circumstances truly necessitate it). The agency head or CUI SAO should therefore grant these waivers only in extremely rare cases and when necessary to support an agency's mission.
6. Exigent circumstances waivers may only be granted if the agency head or CUI SAO determines that the waiver is necessary to prevent harm to the agency or personnel or to avoid impeding efficient information-sharing among agencies or non-Federal entities in times of emergencies or crises. Such situations may include, but are not limited to, broad events such as natural disasters, national emergencies, and pandemics, and agency-specific situations such as a fire that destroys a facility, a significant system outage, or a critical need to immediately share information.

7. The first two waivers described in 32 CFR 2002.38, paragraphs (a) and (b), are marking waivers, and both of those paragraphs, as well as sub-paragraph (d)(3), make it clear that marking waivers do not apply when the covered CUI is shared outside the agency. However, exigent circumstances waivers are not marking waivers (though one of the items that can be waived in exigent circumstances is marking). As a result, these waivers are not subject to the same limitation. Sub-paragraph (c)(2) on exigent circumstances waivers explicitly states that “exigent circumstances waivers may apply when an agency shares the information with other agencies or non-Federal entities.”
8. If an agency properly invokes an exigent circumstances waiver to temporarily forgo CUI marking requirements, but still wants to share affected CUI externally, the agency must follow the second part of 32 CFR 2002.38, sub-paragraph (c)(2). In essence, this means agencies must still make external recipients of CUI aware of the information's status as a particular type of CUI, even though an agency is not properly marking it at that time. And, in accordance with sub-paragraph (d)(5), when the circumstances requiring the waiver end, the agency must re-institute CUI requirements for the covered information without delay (although the agency does not need to redistribute the CUI to external recipients once they mark it).
9. Exigent circumstances waivers must follow all other waiver requirements set forth in 32 CFR 2002.38, including the requirements to detail in each waiver the alternate protection methods, report and describe all waivers in the CUI annual report, and notify authorized recipients and the public (typically via a CUI page on the agency’s website) of the waivers.
10. Exigent circumstances waivers may apply to some controls for CUI Specified information. With regard to Specified CUI, an exigent circumstances waiver may waive controls established by the applicable law, regulation, or Government-wide policy (LRGWP) if the LRGWP makes those controls optional (even if the agency has elected to make them mandatory as part of its internal policy) or if the LRGWP has stated those controls in a manner that allows for flexibility in how the agency meets them. In addition, an exigent circumstances waiver for Specified CUI may waive any CUI Basic requirements that apply to that Specified CUI. However, agencies must be particularly careful in the case of Specified CUI to ensure that the alternate controls outlined in the exigent circumstances waiver achieve the same safeguarding outcome required by the LRGWP applicable to that information.
11. An exigent circumstances waiver may also apply to multiple categories of CUI at the same time as long as the controls it establishes for each category of CUI meet the required safeguarding and dissemination controls required by the LRGWP authorizing the categories of CUI included in the waiver. Exigent circumstances waivers may also set different controls for different categories listed in the waiver.
12. Agencies should expect the CUI EA to more heavily scrutinize exigent circumstances waivers than standard marking waivers because of the factors described above.

**Please direct any questions regarding this notice to: [CUI@nara.gov](mailto:CUI@nara.gov)**

  
MARK A. BRADLEY  
Director